

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE UNITED STATES for the use of )  
GMW Fire Protection, Inc., an Alaska )  
Corporation, )

Plaintiff, )

vs. )

KANAG'IQ CONSTRUCTION CO., )  
INC., an Alaska Corporation and )  
WESTERN SURETY COMPANY, a )  
South Dakota Corporation, )

Defendants. )

Case No. A05-170 Civil (TMB)

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE**

Defendants, KANAG'IQ CONSTRUCTION CO., INC. and WESTERN SURETY COMPANY ("Kanag'iq"), by and through their counsel, Eide & Gingras, P.C., submit their opposition to Plaintiff's Motion in Limine.

**STATEMENT OF UNCONTESTED FACTS**

The facts set forth below are the uncontested facts as submitted to the Court in the Proposed Joint Pre-Trial Order. To the extent Plaintiff's Motion in Limine sets forth additional background facts, most of those facts are disputed. Many of the facts, both disputed and undisputed, are also set forth in the briefing with respect to earlier dispositive motion practice in this case.

1 This is a construction contract case. In May 2000, the United States entered into a  
2 government contract (main contract) with Kanag'iq to construct fire alarm and sprinkler  
3 systems at Elmendorf Air Force Base in Anchorage. In October 2000, Kanag'iq entered  
4 into a subcontract with GMW to furnish and perform work on the fire protection  
5 construction project at Elmendorf.

6 Kanag'iq is the principal on a payment bond required by the government in such  
7 contracts. The payment bond is to protect persons supplying labor and material in  
8 carrying out the work provided for on the construction project. Co-Defendant Western  
9 Surety Company is the surety on the bond. Within this factual background, the following  
10 additional facts are not disputed:  
11

- 12 1. the main contract was written as a unit price contract;
- 13 2. the term of the main contract: the base year for the main contract was  
14 September 29, 2000 to September 29, 2001;
- 15 3. the written terms of the main contract;
- 16 4. the main contract included an option to extend the term of the contract  
17 beyond the base year, not to exceed thirty-six (36) months;
- 18 5. GMW last performed labor or furnished materials under its Contract with  
19 Kanag'iq more than ninety (90) days, but less than one (1) year, prior to the  
20 filing of the complaint; [July 15, 2005]
- 21 6. Kanag'iq paid GMW a total of between One Million Five Hundred Eighty-  
22 Eight Thousand Eight Hundred Fifty-Six Dollars and Ninety-Four Cents  
23 (\$1,588,856.94) and One Million Five Hundred Ninety-Four Thousand  
24 Seven Hundred Eighty-Eight Dollars and Forty-Four Cents (\$1,594,788.44).

## DISCUSSION

**A. Because Plaintiff's Motion In Limine Is Actually A Dispositive Motion On The Issue Of The Unfair Trade Practices Act, The Motion Is Disingenuous, Untimely, And Should Be Denied.**

Alaska's Unfair Trade Practices Act ("the Act") provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful. AS 45.50.471(a). The Act then elaborates upon what constitutes unfair or deceptive acts, which include using or employing deception, fraud, or misrepresentation. AS 45.50.471(a)(12). The Alaska Supreme Court has held that there need be no intent to deceive. See Kenai Chrysler Center, Inc. v. Denison, 167 P.3d 1240, 1255 (Alaska 2007). All that is required is that the act or practice has the capacity to deceive. Id. Kanag'iq alleges, pursuant to AS 45.50.471 *et seq.*, that GMW violated the Act by over-billing Kanag'iq for services and materials provided. Specifically, Kanag'iq alleges GMW engaged in an unfair trade practice when it misled or deceived Kanag'iq with respect to the accuracy of its invoices, the value of services or materials provided, or the rights conferred under the contract. Plaintiff seeks to preclude Kanag'iq from introducing evidence related to GMW's alleged violation of the Act by filing its Motion in Limine.

First, the underlying motion is disingenuous. The motion is, in effect, a motion for summary judgment on the issue of GMW's alleged violation of Alaska's Unfair Trade Practices Act in this matter. While styled a motion in limine, the motion seeks not

1 to limit evidence with regard to a particular claim but to dispose of the claim altogether.

2 As such, the motion is not an evidentiary motion -- it is a dispositive motion.

3 Second, the deadline for dispositive motions under the Court's Scheduling and  
4 Planning Order was thirty (30) days from the close of discovery. [Order, p. 4] The close  
5 of discovery was May 18, 2006. [Order, p. 2] Thus, the deadline for dispositive motions  
6 was June 19, 2006. That deadline has long passed. The underlying motion, dispositive  
7 in nature, is thus untimely and should be denied.  
8

9 **B. Because There Is Enough Evidence To Create A Genuine Issue Of Material**  
10 **Fact As To Whether GMW Violated The Unfair Trade Practices Act, Plaintiff's**  
11 **Motion Should Be Denied.**

12 Even if the motion is not considered dispositive and barred as being untimely,  
13 Kanag'iq needs only to present enough evidence to establish a genuine issue of material  
14 fact on the issue of whether GMW violated the Act in order for the claim to survive. To  
15 the extent there is any question as to whether the Act applies to this matter, the Alaska  
16 Supreme Court has held that Alaska's Unfair Trade Practices Act applies to business  
17 transactions as well as to consumer transactions. See Western Star Trucks, Inc. v. Big  
18 Iron Equipment Service, Inc., 101 P.3d 1047 (Alaska 2004). While the sale of real  
19 property is not within the regulatory scope of the Act, the contract in this case did not  
20 involve the sale of real property. Id. at 1051. Rather, the contract in this case involved  
21 goods and services and is thus squarely within the regulatory scope of the Act. Id. at  
22 1051-1053.  
23  
24  
25

GMW argues the evidence is insufficient to establish a claim under the Act. [Motion in Limine, p. 9, ¶ 2] GMW is mistaken. Attached is the Affidavit of William Jury, owner of Kanag'iq, which attests to the fact that Kanag'iq was deceived by GMW's billing practices. [Exhibit A, Affidavit of William Jury] Plaintiff's argument that there is insufficient evidence to establish any such claim is without merit. Because there is a genuine issue of material fact with regard to whether GMW committed an unfair trade practice and violated the Act, the question is one for the jury.

GMW summarily argues that overcharging by one party to a contract does not rise to the level of an unfair trade practice, citing Hudson River Cruises, Inc. v. Bridgeport Drydock Corp., 892 F. Supp. 380 (D. Conn. 1994). Hudson River, however, concerned a maritime matter involving an oral contract, and the findings were fact-specific. Id. at 382-383. The court explicitly stated that the allegations were without merit "in light of the following factual findings. . . ." Id. at 387. Whether overcharging by one party to a contract rises to the level of an unfair trade practice depends on the particular facts of the case. Therefore, the question is one for the jury and the underlying motion should be denied.

## CONCLUSION

First, Plaintiff's Motion in Limine seeks to dispose of Defendants' claim pursuant to Alaska's Unfair Trade Practices Act. As such, the motion is dispositive rather than evidentiary in nature and is thus untimely. Second, the Act applies to this case because it

1 involves transactions between businesses, unrelated to the sale of real property. Finally,  
2 there is enough evidence to establish a genuine issue of material fact as to whether GMW  
3 violated the Act. For all of these reasons, Plaintiff's Motion in Limine should be denied.

4 DATED at Anchorage, Alaska this 17<sup>th</sup> day of December 2007.

5 EIDE & GINGRAS, P.C.  
6 Attorneys for Defendants  
7 Kanag'iq Construction Co., Inc. and  
8 Western Surety Company

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15 **CERTIFICATE OF SERVICE**

16 I am a legal secretary employed by the law  
17 firm of Eide & Gingras, P.C. That on this  
18 17<sup>th</sup> day of December 2007, I served

19 [x] Electronically

20 a true and accurate copy of the foregoing  
21 document upon the following counsel of record:

22 Sarah J. Tugman, Esq.  
23 2509 Eide Street, Suite 4  
24 Anchorage, AK 99503

25 EIDE & GINGRAS, P.C.

By /s/Donna Charter  
Donna Charter

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